IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 331 OF 1984

Azizunissa Adburrahman Kadri
R/o. "Noon-Baker" Apartment.
6th Floor, Flat No.11, Motlibai Street
Bombay Central,
Bombay.

... Plaintiff.

V/s.

1) Jamila Abdul Hussein Shaikh
(Since deceased through her L.Rs.)

1-A) Advocate Abu Abdulla Mulla,
232, Karve Road, Market Yard,
At Karad, District- Satara.

1-B) Shri Kutbuddin Abdulla Mulla,
7 Shanivar Peth, New Steps,
At Karad, District- Satara.

1(C) Iqbal Kasam Shaikh,
F-17, 3-1, Sector 29,
Vashi, New Mumbai-400 703.

1(D) Mr. Wahid Rahiman Mulla.

1(E) Mr. Rafique Rahiman Mulla.

1(F) Mr. Fayyaz Rahiman Mulla.
All R/o. 232/C, Karve Road,
Market Yard,
At Karad, District- Satara.

1(G) Anjuman Kutubuddin Mulla
D/o. Kutubuddin Haji Abudulla Mulla.

1(H) Najamal Husain Kutubbuddin Mulla.
S/o. Kutubuddin Haji Abdulla Mulla.

1(I) Sajid Kutubuddin Mulla
S/o. Kutubuddin Haji Abdulla Mulla.

1(J) Farooq Shabbir Khan
S/o. Shabbir Imam Khan.

2. Zainulabedin Abdulrehman Shaikh.

3. Abdul Rashid Abdulrehman Shaikh.

4. Abdul Majid Abdulrehman Shaikh.

5. Badruddin Abdulraheman Shaikh.

6. Abdul Hamid Abdulraheman Shaikh.

7. Mrs. Fatima Mohamed Hanif Mujawar.

8. Mrs. Shamshunnissa Rashid Jamkhandi.

9. Miss. Sadrunnissa Abdulraheman Shaikh.

10. Mrs. Badrunnissa Sirajuddin.

11. Miss Jamilunnissa Abdulraheman Shaikh.
No. 2 to 11 R/o. C/o Shri Zainulabedin
Abdulraheman Shaikh,
345/4151, Group No.4,
Ganesh Mandir Road,
Vikroli,
Bombay - 400 083.

12. Miss. Hajra Abdulgafoor Danekai,
R/o. Bharpeth Galli,
Behind Mecca Masjid,
At post Jamkhandi,
District Bijapur,
Karnataka State.

... Defendants.

Mr. Shailesh Shah alongwith Mr. Mr. Paritosh Jaiswal i/by M/s. Kanga & Co. for plaintiff.

Mr. R.A. Bhagatjee for the defendants.

CORAM : ANOOP V. MOHTA,J.

RESERVED ON : 28TH MARCH, 2007

PRONOUNCED ON : 4TH JUNE, 2007

JUDGMENT:-

One Abdul Hussein Kasam Sheikh, died intestate at Bombay on 30th August, 1983 at the age of 84 years. (the deceased). The plaintiff, the daughter from first wife of the deceased, has filed the present suit for administration of the estate on 3rd February, 1984 as the deceased left diverse movable and immovable properties in Bombay (Khar) and at (Karad) Satara, as described in Exhibit "A". The plaintiff has restricted her claim to the said immovable properties.

2. Defendant No.1 Jamila Shaikh was third wife of the deceased. She died on 18th July, 2003; Defendant No.2 to 12 are the other heirs of the deceased being the deceased brother's children. As pending the suit, defendant No.1 by way of a memorandum of oral family settlement dated 18th August, 1999 alongwith the declaration, alleged to have transferred the properties to defendant no. 1 (G) to 1 (J). Therefore, after her death these defendants have been brought on record.

3. Admittedly, the parties are governed by the Sunni Hanafi Mohamedan Law. Defendant No.1 had no issue. Plaintiff has also no issue. As per the plaintiff,

the respective shares in the estate left by the deceased is described in para 3 of the plaint.

4. Defendant No.1 married the deceased on 13th June, 1940. She was the third wife. The plaintiff married some time in December, 1956. By a registered documents dated 29th March, 1957, the deceased and defendant No.1 purchased the property situated at 14th Road, Khar. Defendant No.1 till her death, since the day of the purchase of property, occupied the said Khar Property as joint tenants with the deceased alongwith other defendants specially defendant No.1(G) to 1 (J).

5. As per the said registered documents the said premises/property is for "the use and benefit of the purchasers as joint tenants/ownership forever so that on the death of one of the purchasers, the survivor of them, should be entitled to the whole of the premises". In view of the clear terms of the said documents after the death of the deceased, defendant No.1 became the exclusive owner of the said property. She was occupying and using the said premises with the knowledge of the plaintiff.

6. The deceased, on 9th May, 1972, had purchased a flat from Shalimar Builder for plaintiff being the daughter from first wife. Various other movable properties had also been provided to the plaintiff, including cars and shares. There are various shares purchased in the joint name of the deceased and the plaintiff as well as defendant No.1.

7. The deceased sold FSI of the Khar property on 17th December, 1981. The suit No.1276/1983 in respect of the FSI is still pending.

8. The deceased in the name of defendant No.1 purchased the Karad property on 18th December, 1981 out of the consideration received from the sale of FSI of Khar property. The deceased died on 30th August, 1983.

9. The plaintiff filed the suit on 3rd February, 1984, that is after the death of deceased.

10. By minutes of order dated 20th December, 1984 in notice of motion No. 481 of 1984 in suit No. 331 of 1984, defendant No.1 undertook as under:-

"2. 1st Defendant undertakes to this

Hon'ble Court not to transfer alienate, part with possession, encumber, and/or create any third party rights in respect of the immovable properties described at Item II in Exhibit "A" to the plaint. The 1st Defendant undertakes to maintain accounts of the rents received by her.

5. The above is without prejudice to the rights and contentions of the parties to the suit."

The said order remained unchallenged.

11. Defendant No.1 by the memorandum of oral family settlement dated 18th August, 1999 alongwith declaration, alleged to have been transferred the Khar property to defendant No.1(G) to 1(J). Defendant No.1 filed her written statement on 29th September, 1999. Defendant No.1 died on 18th July, 2003. Therefore, defendant nos. 1(A) to 1(F) have been added as heirs and representative of defendant No.1. Defendant No. 1(G) to 1(J) has moved an application as party defendants. They were ordered to be added as heirs of defendant No.1 in view of the family arrangement Plaintiff has resisted the said averments.

12. The plaintiff has not led her own evidence. But her husband Syed Abdurraheman Kadari gave evidence and

died after the cross-examination. Defendant No.1(G) to 1(H) have filed their written statement in place of defendant No.1 on 7th July, 2005. On 21st July, 2005 the plaintiff's husband in examination-in-chief commenced and he was cross-examined from 5th May, 2006 to 12th May, 2006. Defendant No.1(G) filed his examination-in-chief on 10th June, 2003. Defendant No.1(G) to 1(H) through its power of attorney submitted their examination-in-chief dated 13th September, 2006. He was cross-examined on 10th December, 2006.

13. The issues in the suit are as under:-

1. Whether the plaintiff proves that the deceased Abdul Hussein left estates set out in Exhibit 'A' to the plaint?

2. Whether the plaintiff proves that the shares of plaintiff and defendants in the estate of the deceased are as alleged in para 3 of the plaint?

3. Whether the plaintiff proves that the defendant No.1 was manipulating and operating Bank Accounts and other moveable properties and assets of the deceased, as alleged in para 8 of the plaint?

4. Whether the defendant No.1 proves that the plaintiff has suppressed the properties received from the deceased as alleged in para 2 of the Written Statement?

5. Whether particulars given in Exh."A"

to the plaint are not correct as alleged in para 2 of the written statement?

6. Whether the deceased had distributed properties in approximately equal proportion for plaintiff and defendant No.1 in his life time and whether the same was accepted by plaintiff and defendant No.1 as alleged in paras 3 and 6 of the written statement?

7. Whether the deceased Abdul Husein had gifted away or distributed or transferred the Bungalow at Khar to defendant No.1 as alleged in para 4 of the written statement?

8. Whether the Bungalow at Khar was purchased for the benefit of defendant No.1 as alleged in para 4 of the written statement?

9. Whether the shares standing in the name of the deceased and/or jointly standing in the names of deceased and defendant No.1 and jewellery were gifted to defendant No.1 by the deceased during his life time as alleged in para 5 of the written statement?

10. Whether the defendant No.1 proves the shares standing in the name of the deceased and the plaintiff jointly (as per Exh."A" of the written statement) were gifted to plaintiff by the deceased during his life time?

11. Whether the Bungalow known as "Gulistan" at 14th Road, Khar, is the absolute property of defendant No.1 in view of conveyance dated 29/03/1957 as alleged in para 7 of the written statement?

12. Whether FDR of Rs. 3,75,000/- in Union Bank of India, Khar Branch, were left by the deceased for the benefit of defendant No.1 as alleged in para

11 of the written statement?

13. Does the plaintiff prove that the deceased Abdul Hussein Kasam Shaikh was suffering from Marz-ul-maut prior to 31st March, 1982 and was invalid?

14. Whether defendant Nos. 2 to 12 are the heirs of the deceased as alleged in para 3 of the plaint?

15. Do the defendant Nos. 1(G) to 1(J) have acquired title to the suit property by virtue of the agreement of Family Settlement dated 18th August, 1999?

14. **Issue Nos.1 & 2:-** Both the parties have not disputed that the deceased left the estate set out in Exhibit "A" to the plaint.

15. **Issue Nos.3,4,5,6,9,10,12,13, and 14:-** There was no argument canvased on these issues as there is no much dispute on these issues. The plaintiffs and the defendants have not pressed these issues. They restricted the claim only in respect of immovable properties in question.

16. **Issue Nos. 7,8 and 11:-** By the registered deed dated 29th March, 1957, the property at Khar was purchased in the joint name of the deceased and defendant No.1. The following is the important portion of the deed:

> . "TO HAVE AND TO HOLD the said land hereditaments and premises and all and singular and other the premises hereby granted conveyed and assured or expressed so to be unto and to the use and benefit of the purchasers as joint tenants for ever so that on the death of one of the purchasers the survivor of them shall become absolutely entitled to the whole of the said land hereditaments and premises."

. The above portion shows the definite intention of the purchasers. In the result, as intended, on the death of one of the purchasers the survivor of them shall become absolute owner of the whole of the premises. In the present case, after the death of deceased, defendant no.1 was being the survivor, became absolute owner of the said property. This registered document is not in dispute. The plaintiff has tried to interpret the said document by contending that it is not permissible under the Muhammadan Law to whole property as joint tenants with the benefit of survivorship. However, in **Mahomed Jusab Abdulla Vs. Fatmabai Jusab Abdulla AIR (35) 1948, Bombay Page 53 (C.N. 11),** the Bombay High Court has observed that:-

> . "It is permissible to persons having been by Mahomedan Law to hold property as joint tenants with the benefit of survivorship and such interest in the property is not opposed to or

repugnant to Mahomedan Law".

17. Defendant No.1 was the third wife of the deceased. The Khar property was purchased on 29th March, 1957. The deceased and defendant No.1 were occupying the said property together till their death. The suit was filed on 3rd February, 1984 after the death of deceased. The FSI of the Khar property was also sold on 17th December, 1981. The property at Karad was purchased by defendant No.1 on 18th December, 1981 after the sale of FSI of Khar property on 17th December, 1981. The suit No.1276/1983, for specific performance of FSI of Khar property, is still pending. The property at Karad was also purchased on 18th December, 1981 by a registered deed in the name of the deceased and defendant No.1. Admittedly, the deceased and defendant no.1 were residing together at that time. There was no objection of any kind raised by the plaintiff, as deceased had taken all care to give requisite movable property and immovable property to the plaintiff being the daughter of his first wife. The other defendant Nos. 1(G) to 1(J) were residing with the deceased and defendant No.1 since 1976. The husband of the plaintiff or the plaintiff had never objected about defendant nos. 1(G) to 1(J) staying

with defendant No.1 till the death of the deceased. Therefore, defendant No.1 had every right to transfer or gift the Khar or Karad property being the owner of the same, as referred above. The Karad property purchased from the consideration received, as FSI of Khar property was sold, during the life time of the deceased. Defendant No.1, therefore, became the owner of the Karad property also as it was purchased by registered deed as referred above. There is no bar under the Mohamedan Law that a Memodian can not dispose of his/her property during his/her life time. The deceased, therefore, during his life time, had distributed, granted and gifted away all his properties between the plaintiffs and defendant No.1. During the deceased's life time itself, the distribution of all those movable and immovable properties had been accepted by the plaintiff and defendant No.1. They have been in possession of the same till this date, accordingly.

18. The submission, therefore, that conveyance dated 29th September, 1957 does not create any right, in favour of the original defendant no.1, has no substance. The plaintiff fail to prove or discharge the burden to support his allegations that original

defendant no.1 was added only for the sake of convenience and defendant No.1 was a benamidar. The documents itself reflects the intention of the parties. The challenge to the said intention or a document by the plaintiff after the death of the deceased father, on the foundation that the entire consideration for both the properties was paid by the deceased Abdul Hussein Kasam Shaikh, therefore, also is unaccepted.

19. The judgments cited in **AIR 1928 Privy Council 172 in Guran Ditta and another Vs. T. Ram Ditta, AIR (33) 1946 Bombay 157 in Ratanchand Fakirchand Vs. Deochand Dahyabhai, AIR 1974, SC 171 in Jaydayal Poddar Vs. Mst. Bibi Hazra, AIR 1980 SC 727, Bhim Singh Vs. Kan Singh, (1996) 4 SCC 490 in Heirs of Vrajlal J. Ganatra Vs. Heirs of Parshottam S. Shah** are distinct and distinguishable on the facts itself.

. In all above cases cited by the plaintiff, the issue was about the purchase of the property by a husband in the name of his wife for her advancement. In the present case, the husband is not at all disputing the said document or transaction. Third party like plaintiff, on fact being unable to prove

anything contrary to the intention as reflected in the written registered documents. The purchaser's of the properties were enjoying the joint possession of the said property without any obstruction. As the documents in question is clear and as person like plaintiff fail to discharge her burden that the transaction was benami transaction, and in view of the clear intention and clauses of the documents, there is nothing to overlook and or to over write the written documents. The plaintiff failed to discharge her burden and or rebute the presumption. In the facts and circumstances, though assume for a moment that the basic consideration is paid by the deceased, the father of the plaintiff, that itself is nowhere affecting the intention and the contents of both the registered documents relating to the Khar as well as Karad property.

20. The submission that Income Tax/ Wealth Tax officers held that the deceased was the real owner and defendant No.1 was the benamidar of her husband, nowhere affects the intention as reflected in these two documents. The findings recorded by the said two authorities was for the purpose of taxing and revenue and that itself cannot be the foundation for claiming

right on the property of the deceased and of defendant no.1 by the plaintiff. The submission that in view of the Income Tax Authorities decision that the entire properties are belonging to the deceased, is final and binding is not correct. Such authorities can not decide or declare the title of any immovable property. They have limited scope and jurisdiction under the respective revenue laws. The plaintiff has failed to prove her case, independently. Defendant No.1 in view of the registered documents dated 29th March, 1957 and 18th December, 1981 became the absolute owner of the property and therefore, entitled to dispose of the same during her life time as done in the present case.

21. Admittedly, before the Taxing Authority, the plaintiff was not the party. There was no dispute about the title or ownership raised before the authorities between the plaintiff and defendant no.1 or the deceased. There is no challenge made to the said finding by defendant No.1 or other defendants. Still the said decision of authorities against the deceased in no way gives any entitlement and or right in favour of the plaintiff to claim ownership and the properties in question in the Mohamedan Law or any such law.

22. The ownership of the property based on this registered deed, as registered deeds are intact and remained unchallenged. The entitlement of defendant no.1 was in no way affected and or disturbed. Defendant No.1, therefore, was the owner of the said properties in view of these two documents and being Memodian, during her life time itself orally gifted and later on reflected in writing in the name of defendant No.1(G) and 1(J), cannot be faulted with. The said arrangement needs to be respected being the family arrangement made in view of their intention already expressed to the said defendants, who are on the date of family arrangement and or even prior to that living with defendant no.1 and or with the deceased also.

23. **Issue No.15:-** Considering the above facts and circumstances, as defendant No.1 have clear right and ownership of the suit property, being a Memodian had gifted away her properties in the family as reflected in the oral family arrangement and specially in favour of defendant no.1(G) to 1(J) which is permissible and therefore, these defendants have acquired title to the suit property by virtue of the family agreement dated

18th August, 1989. There was no dispute that these defendants have been staying with defendant No.1 and the deceased since 1976 at least. As evidence shows, during the life time of deceased and defendant no.1 all these defendants 1(G) to 1(J) have taken care and provided specially to defendant No.1 all the things, livelihood and looked after all their needs till their demise. They were paying for all the outgoings of the property out of their own resources, specially defendant no.1(G) and 1(J). Therefore, have acquired rights as expressed in the family arrangement by defendant No.1. There is no bar in such gift/grant under the Mohamed law.

24. The submission that defendant no.1 by the family arrangement dated 18th August, 1999 transferred the property in favour of defendant No.1(G) to 1(J) in spite of the minutes of order dated 20th December,1984 and therefore, no rights whatsoever, has been created in favour of the said defendants or parties as reflected in the said family arrangements is not correct. The challenge is to the contemptible action has also no force. The reliance is placed on **Kesharimal Jivji Shah & Anr. Vs. Bank of Maharashtra & Ors. 2004(3) Mh.L.J. 893** is of no assistance to

the plaintiff. The facts are total distinct and distinguishable. If oral gift is permissible then, merely it was recorded afterword in writing that itself can not taken away the vigor of oral gift, specially when all ingredients of valid oral gift are proved.

25. Once it is held that defendant No.1 being absolute owner of the properties in question, is entitled to gift away the property to the person of her choice, then the family arrangement dated 18th August, 1999 is nothing but a written documents based on the oral arrangement made and was decided by the deceased and defendant no.1 in favour of defendant Nos. 1(G) to 1(J) as referred in the said memorandum. The memorandum itself reflects that this family arrangement has been arrived at to settle the dispute and difference arose between the parties to maintain the family peace and harmony to the property held by the deceased and defendant No.1. Defendant No.1(G) to 1(J) are the close relatives of defendant No.1. It is reflected that all the parties have agreed for this oral settlement. Defendant No.1 and defendant Nos. 1(G) to 1(J) have been residing together in the portion of the Khar property since 1976. Being the

owner, defendant No.1, therefore, expressed in the said documents various provisions and distribution of the properties. There are also references made to the litigation pending.

26. As the oral gift is permissible and by this documents the said oral gifts have been reflected in writing and the parties in whose favour the said gift has been made and as they are living/residing in the said property, itself, no physical departure or formal entry is necessary. Such arrangement is, therefore, valid under the Mohamedan Law. Once oral Hiba (gift) is permissible and as declaration was given by the owner of the property, defendant no.1 and as the same has been accepted by the donee, this amounts to a valid oral gift and in absence of any specific bar under the Mohamedan Law. All essential of the oral gifts under the Mohamedan Law has been completed with. The contention that such unregistered deed need not be accepted or creates no rights, is rejected. As it fulfills the essential conditions and, therefore, the oral gift of immovable property is proved and need to be accepted. The plaintiff failed to discharge its burden to prove otherwise. Once the oral gift is valid under the Mohamedan Law it need not require any

writing or in documents. Therefore, only because it has been reflected in writing later on, that itself cannot destroy the oral gift or intention of the donor.

27. The Apex Court in **Mehboob Saheb Vs. Syed Ismail, AIR 1995 SC 1205** observed as under in this regard:-

> "5. Under Section 147 of the Principles of Mohammedan Law by Mulla, 19th Edition, Edited by Chief Justice M. Hidayatulla, envisages that writing is not essential to the validity of a gift either of movable or of immovable property. Section 148 requires that it is essential, to the validity of a gift, that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under Section 149, three essentials to the validity of the gift should be, (i) a declaration of gift by the donor; (ii) acceptance of the gift, express or implied, by or on behalf of the donee; and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking possession of the gift by the donee, actually or constructively. Then only gift is complete. Section 152 envisages that where donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically

> departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would thus, be clear that though gift by a Mohamedan is not required to be in writing and consequently need not be registered under the Registration Act, a gift to be complete there should be a declaration of the gift by the donor, acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of the possession of the property, the subject matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift. "

28. The Apex Court decision (Mehboob Saheb) has been further followed in **AIR 2000 Karnataka 318 in Mujir Ahmed and anr. Vs. Mohammed Zafrulla.**

29. The plaintiff therefore, failed to prove that defendant no.1 had no right to create interest or title in favour of 1(G) to 1(J) and it is rejected. In the result, defendant No.1 had and now defendant Nos. 1(G) to 1(J) have clear title to the suit property.

30. For the above reasons the suit is dismissed.

31. The interim orders also stand vacated.

32. No costs.

[ANOOP V. MOHTA, J.]